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**In The
Supreme Court of the United States**

October Term 1984

PRINCE WILLIAM COUNTY, VIRGINIA, *et al.*,
Petitioners,

v.

TERRELL DON HUTTO, *et al.*,
Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit correctly held, consistent with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) that the good faith defense turns primarily, but not exclusively, on objective factors.



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In The
Supreme Court of the United States
October Term 1984

No. 83-1783

PRINCE WILLIAM COUNTY, VIRGINIA, *et al.*,
Petitioners,

v.

TERRELL DON HUTTO, *et al.*,
Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

OPINIONS BELOW

The memorandum opinion of the district court denying the County's cross-claim against the State Defendants is unreported and is included herein as Appendix A. The opinion of the court of appeals is reported at 725 F.2d 954 (4th Cir. 1984).

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This action was originally filed in November, 1981, by an inmate and former inmate of the Prince William County, Virginia Jail (the "Jail"). Subsequently, the district court granted class certification to all persons incarcerated in the Jail from August 1, 1980, through January 22, 1982. The plaintiffs alleged that during their incarceration they were subjected to overcrowding and other conditions which amounted to cruel and unusual punishment. They requested declaratory and injunctive relief and damages. The named defendants included Prince William County, the Sheriff of Prince William County, the Prince William County Board of Supervisors (collectively referred to as the "County"), and the chairman and the members of the Virginia Board of Corrections (hereinafter the "Board") and the director of the Department of Corrections (collectively referred to as the "State defendants"). All the defendants, with the exception of Prince William County, were sued in their individual and official capacities.

During the course of the litigation, the County filed a cross-claim against the Commonwealth alleging, essentially, that the Commonwealth had an obligation to depopulate the Jail by transferring the inmates to other local jails or into the state penal system. The County also alleged that the Commonwealth's failure to depopulate the jail rendered the Commonwealth jointly liable with the county for any verdict based on overcrowding. The State pled a good faith defense to such liability.

A bifurcated jury trial was conducted on the issues of liability and damages. During the liability portion of the trial, plaintiffs presented evidence that they had been subjected to unconstitutional overcrowding, poor sanitation, understaffing, and lack of access to the law library. The

County admitted the jail conditions were poor, but denied liability, and presented evidence that the Commonwealth was aware of the overcrowded conditions and did nothing to alleviate them.

The State introduced evidence that in February of 1978, the Virginia Board of Corrections became aware of an adverse jail inspection report of the Prince William County Jail. In response to that report, the Board sent one of its members to meet the chief judge of the Circuit Court of Prince William County. As a result of that meeting, there was a request by the Board in May of 1978 to the Department of Corrections to arrange for a special follow-up inspection to see if conditions in the Jail had been improved. The results of that inspection were reported to the Board at its June, 1978, meeting. At the June meeting, the Board discussed with its counsel, an Assistant Attorney General, its options to correct deficiencies noted in the second inspection report.¹ Counsel advised the Board that one option open to them was to take action pursuant to the Code of Virginia² which permitted the Board to bring noted deficiencies to the chief circuit court judge's attention who had authority to order corrections upon evidence of adverse conditions. Counsel also advised the Board that another option available to them was the taking of direct administrative action in accordance with the State's Administrative Process Act, but

¹ Petitioner has included in an appendix to his petition a paper prepared by some unidentified jail inspector which purports to set forth options available to the Board of Corrections to deal with the Prince William Jail. Incredibly, petitioner seems to contend that the State defendants should have ignored the advice of their attorney concerning their duties under the Code of Virginia and followed a course advocated by a layman.

² The sections of the Code of Virginia relevant to the facts of this case are: § 53-135 (now § 53.1-70), 53-134 (now § 53.1-69), § 53-19.17 (now incorporated into 53.1-21) 53-129 (now 53.1-71) and § 19.2-310, all of which may be found at Appendix B.

in his opinion this was not a viable option because the Board's authority was limited to enforcing its own standards. At the time in question, the Board had not enacted standards specifically addressing overcrowding, and this was the thrust of the problem at the Prince William County Jail.

At the Board's direction, therefore, counsel drafted a petition in letter form addressed to the chief judge, enclosing the inspection reports and requesting that the court consider taking action against the County in the form of an order to show cause to either erect a new jail to improve the conditions in the old jail, *inter alia*, by a population reduction. Shortly after communication with the court, the Chairman of the Board of Corrections received a reply from the chief judge which advised that the planning process was underway for a new jail, and that the court would thus hold in abeyance issuance of further orders depending upon the county's action. As a result, the Board Chairman, by further correspondence, requested that the court keep the Board informed of developments.

Later in the summer of 1978, the Board received additional information from the then acting county administrator of Prince William County. These reports detailed improvements that had been made in the Jail to include correction of fire safety deficiencies. Although the matter continued to be discussed by the Board periodically, the County did not make the Board aware of any alleged "unconstitutional" conditions in the Jail that would have necessitated further action.

Counsel testified at the trial of this matter in response to a question on cross-examination, that he advised the Board that the only viable action they had available to limit the population in the Prince William County Jail was to report known deficiencies to chief judge of the circuit court.

On redirect examination, counsel explained that any ordered population cap by the Board through its own administrative means would ultimately be enforced through the circuit court. In light of the fact that the Board had already approached the circuit court and requested a reduction of population, and was told, in effect, that that request was to be taken under advisement by the Court, further efforts by the Board to limit population would have been fruitless, and he so advised the Board.

Terrell D. Hutto, the Director of the Department of Corrections, testified that in response to overcrowding generally in both state and local prisons, the Department of Corrections devised a priority system to facilitate the flow of inmates from local jails into the Department of Corrections. Mr. Hutto also testified that there was a lack of beds available for long-term maximum security inmates which exacerbated overcrowding state wide.

Mr. Hutto noted during his testimony that the authority of the Director of the Department of Corrections to transfer inmates from one penal institution to another was unclear, and that he had been so advised by his attorney periodically when attempts were made to deal with the overcrowding problem. Testimony was also adduced that Mr. Hutto had met with the Sheriff of Prince William County and the Virginia Secretary of Public Safety to discuss their mutual concerns about overcrowding in Northern Virginia. On the date of that meeting, however, there were no inmates in Prince William who were eligible for transfer into the state system, consequently, no relief could be provided to the Sheriff. Mr. Hutto also indicated that in an effort to deal with overcrowding, all security beds, even hospital beds, were filled so that the most could be made of available resources.

At the close of the State's evidence, the County moved for

a directed verdict on its cross-claim. The district judge deferred ruling on this motion and, instead, took the cross-claim under advisement. The judge instructed the jury that the State defendants would not be liable for damages for jail conditions found unconstitutional if they "believed in good faith that their actions were lawful, and that belief was a reasonable one for them to hold." The jury returned a verdict in favor of the plaintiffs, against the County, and in favor of the State defendants. Subsequently, the County moved for judgment notwithstanding the verdict and renewed its motion for a directed verdict on the cross-claim against the State. These motions were denied.

REASONS FOR DENYING THE WRIT

I. The Assumption by the Petitioner, County of Prince William, that Subjective Factors are no Longer to be Considered in the Determination of Good Faith Fundamentally Misconstrues this Court's Holding in *Harlow V. Fitzgerald*.

A. Harlow's Application Is Limited to the Summary Judgment Stage of the Proceedings

It is the petitioner's contention that after this Court's decision in *Harlow*, the subjective prong of the good faith test has been completely eliminated from any consideration of good faith, and only an objective standard is still viable.³

³ The petitioner's reliance on the dicta contained in Justice White's concurring opinion in *Illinois v. Gates*, 103 S.Ct. 2317 (1983), that *Harlow* eliminates the subjective component of the good faith standard is misplaced. The context of the remark is Justice White's response to a contention that a good faith exception to the exclusionary rule would require an inquiry into the subjective belief of law enforcement officers. Justice White's opinion does not mean that subjective factors, viewed objectively, should not be considered at trial. A contrary interpretation would be inconsistent with Justice White's concurrence in *Harlow*. The majority in *Harlow* recognized that the objective test has room in it for subjective elements.

This view, however, ignores the salient factual circumstances that were before the Court in that case and which shaped its decision. *Harlow*, as it applies to the good faith defense, in the final analysis, deals with nothing more than the circumstances and standards under which summary judgment is appropriate when good faith has been raised as a defense. Its rationale should not be extended beyond the pleading stage and must be read in conjunction with the principals of law applicable to summary judgment.

Any discussion of the parameters of the good faith defense as described in *Harlow* must begin with an examination of *Wood v. Strickland*, 420 U.S. 308 (1974), from which *Harlow* directly descends. In *Wood, id.*, the district court had instructed the jury that a decision in favor of the respondents must be premised upon a finding that the petitioner, a school official, acted with malice. The court of appeals, however, found that the specific intent to wrongfully harm the petitioners was not a requirement for the recovery of damages. Instead, petitioners needed only to establish that the respondents did not, in light of all the circumstances, act in good faith. In its decision, this Court noted that the appropriate standard of good faith necessarily contains elements of both objective and subjective good faith. The Court reasoned specifically:

"The official himself must be acting sincerely and with the belief that he is doing right, but an act violating his students' constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice." 420 U.S. at 321.

The Court noted further that to be entitled to the good faith defense an individual claiming it must be held to a standard

of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. The Court set forth the standard for the good faith defense in holding thus:

"Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the students affected, or if he took the action with malicious intention to cause a deprivation of constitutional rights or other injury to the student."⁴

Harlow states that prior decisions of this Court have established that the good faith defense has both an objective and a subjective aspect; the objective element involves a presumptive knowledge of and respect for basic unquestioned constitutional rights, and the subjective component refers to permissible intentions. Historically the Court has defined these elements by identifying the circumstances in which qualified immunity would not be available. Characteristically, in *Harlow* the Court explained, referring to both the objective and subjective elements, that qualified immunity would be defeated if an official knew or reasonably should have known that the action he took within the sphere of his official responsibility would violate the constitutional rights of the plaintiff, or if he took the action with the malicious intention to cause a deprivation of a constitutional right or other injury.

The Court clarified the reason for its shift in emphasis to

⁴ As this court recognized at note 25 of *Harlow*, although *Wood* explicitly is limited to its factual circumstances, the *Wood* formulation has been quoted as a general statement of the qualified immunity standard. See e.g. *Procunier v. Navarette*, 434 U.S. 555, 562-63, 566 (1978), quoted in *Baker v. McCollan*, 443 U.S. 137 (1979).

a more objective good faith test, by pointing out that the subjective test frequently proves incompatible to the admonition in *Butz v. Economou*, 438 U.S. 478 (1978) that unsubstantial claims should not proceed to trial. The difficulty arises, according to the majority opinion, because an official's subjective good faith has been considered a question of fact necessitating resolution by a jury and which may not be resolved on motion for summary judgment. The Court explains, consistently with the rationale of *Butz*, that bare allegations of malice should not suffice to subject government officials either to the cost of trial or to the burdens of broad-reaching discovery holding on this point that . . . "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. It was upon this basis, essentially, the *Wood* objective good-faith standard, absent the specific language of intent, that the Court upheld the dismissal by summary judgment in *Harlow*. Therefore, it is evident that the *Harlow* discussion of the emphasis on objectivity was directed at streamlining summary judgment procedure. It was intended to harmonize the good faith test with the sensible observations of *Butz* and is not the precursor of the abandonment of subjective good faith in all circumstances.

*B. In Any Event, Harlow Does Not Totally
Eliminate Subjective Factors.*

Even assuming that *Harlow's* restatement of the good faith test has some application beyond the resolution of the question of the availability of good faith at the summary judgment stage, its formulation is consistent with the in-

struction given by the trial court in the instant case that State defendants would not be liable for damages if they believed in good faith that their actions were lawful, and that belief was a reasonable belief for them to hold, because *Harlow*, does not eliminate all subjective considerations. It merely puts them in objective terms. This is made abundantly clear by the carefully chosen language of the opinion. Justice Powell, writing for the Court, took pains to specifically point out that the limits of qualified immunity are to be defined in *essentially* objective terms, and that the test is one that *focuses* on the objective legal reasonableness of an official's acts. (emphasis supplied). Justice Powell also recognized that some extraordinary circumstances may arise where a defendant can prove that he neither knew nor should have known of the relevant legal standard, and, under those circumstances, the official would be entitled to the defense on *primarily* objective factors. Therefore, given the recognition in the *Harlow* opinion that the objective standard is not exclusive, the petitioner's position is untenable.⁵

The petitioner's citation to *Saldana v. Garza*, 684 F.2d 1159 (5th Cir. 1982) in footnote 13 of the petition for certiorari, as heralding a revolution in the law of official immunity, is interesting and revealing. *Saldana* was an action brought under § 1983 against police officers for allegedly subjecting the plaintiff to arrest and detention without

⁵ The proposition that there are still valid subjective considerations in determining good faith after *Harlow* is supported by Justice Brennan's separate opinion in that case. Justice Brennan acknowledges that it may be necessary to utilize discovery to determine what a defendant knew at the time of his actions to determine if a good faith defense is available. This is essentially an inquiry into the subjective.

Trejo v. Perez, 693 F.2d 482 (5th Cir. 1982), cited with approval by the petitioner also recognizes that subjectivity in the good faith determination has not been altogether eliminated by *Harlow*.

probable cause. The defendants affirmatively claimed that they acted "in good faith, and with a reasonable belief in the lawfulness of their acts." In their answers and proposed pretrial order, they claimed that their reasonable good faith belief in the lawfulness of their conduct served as a bar to liability. 584 F.2d at 1162 n.10.

The Fifth Circuit Court of Appeals, applying *Harlow*, noted that prior to that case there were two avenues open to a plaintiff who sought to rebut the qualified immunity defense: either an allegation that the defendant official acted with subjective malice or that the defendant acted in violation of clearly established law. According to the Fifth Circuit, all *Harlow* did was to make the plaintiffs' burden easier by removing the absence of malicious intent as a possible defense. All the plaintiff must now show is the violation of a clearly established statutory or constitutional right. Nevertheless, the court of appeals found in *Saldana* that the plaintiff had failed to meet his burden and overcome the good faith defense by showing that the defendants acted in violation of clearly established law. What is even more telling is that the court did not find that the defendants claim of a good faith and reasonable belief in the lawfulness of their acts was in any way contrary to the standard enunciated in *Harlow* or confusing to the jury. The revolution claimed by the petitioner appears, on close examination, to be no more than a change in the focus from a combination of objective and subjective elements to reliance on primarily objective factors. This is consistent with the language of *Harlow* and the court of appeals decision below in this case. Rather than revolution, *Harlow* indicates evolution and minor evolution at that.

On reflection, the petitioner is asking, in essence, that this case be reversed because the State defendants were held

to a stricter standard than *Harlow* requires. Not only is the instruction in this case inclusive of and not inconsistent with *Harlow*, as the petitioner claims, but the argument is illogical, and frivolous. If the State defendants meet the burden of satisfying an instruction which encompasses both an objective and subjective standard, then it must follow, a fortiori, that they satisfy merely the former. In satisfying more than the law requires, how then can the defendants' good faith be less?

II. Even Under a Purely Objective Standard, the State Meets the Test of Good Faith

The linchpin of the petitioner's argument is his contention that the evidence demonstrated objectively that the defendants knew or should have known that they could alleviate conditions in the Jail and that this objective knowledge deprived them of good faith immunity. Assuming, arguendo, that only objective factors obtain, the criteria established by *Harlow* for good faith is whether the conduct complained of violates clearly established statutory or constitutional rights of which a reasonable person would have known. The petitioner, however, appears to ignore the fact that the "law" involved in this case was not settled at all. In fact, contrary to the view of the jury, the district court, the court of appeals and counsel for the State, the petitioner contends that there were approaches available under state law that the State did not take. What could be more objective good faith in the instant factual situation, however, than consultation with one's attorney as to the options available and then following the advice received? The fact that petitioner does not agree with the advice is irrelevant, because it cannot show that the advice was demonstrably incorrect. The jury concluded that the State acted reasonably, and its conclusion was supported by objective evidence.

The undisputed evidence in this case is that once the State defendants became aware that the Prince William County Jail was overcrowded, both the Board and the Department of Corrections consulted with their attorney and followed his advice in dealing with the problem. Furthermore, no evidence was ever introduced that any of the defendants was ever informed or became aware that the Jail was more than overcrowded. No jail inspection reports or communications from the Sheriff ever indicated to these defendants that conditions in the Jail had reached the proportion of a constitutional deprivation; therefore, from a purely objective review of the conduct of the State defendants, a jury could have and, in fact, did conclude that these defendants acted reasonably in dealing with the Prince William County Jail. Consequently, the objective good faith test has been met in this case, and the petitioner's argument for certiorari must fall of its own weight.

In light of these circumstances and the unique factual situation presented by this case, which is unlikely to re-occur, this case does not present a proper forum for review of the issues presented by the petitioner.

III. Review by This Court Involves Only Questions of the Sufficiency of the Evidence Presented to the Trial Court and Does Not Present a Substantial Federal Question

In the petition for a writ of certiorari, the County points to several areas of disagreement with the jury and the court of appeals on the significance and sufficiency of the evidence adduced at the trial and the jury's conclusions based on that evidence. As long ago as *Mobile v. Eslava*, 41 U.S. 234 (1842) this Court recognized that a factual determination by a jury is conclusive. Moreover, the Court has specifically held that where there is an evidentiary basis for its verdict, the jury is free to disregard or disbelieve whatever

facts are inconsistent with its conclusions. *Basham v. Pennsylvania Railroad Company*, 372 U.S. 669 (1963). However, the petitioner would have the Court disregard its long established precedent and substitute its judgment for that of the jury and the court of appeals in the instant case. The petitioner initially points out in its reasons for granting the writ that the court of appeals *seemingly* accepted the State defendants' claim that they had fairly relied on legal advice that they had no alternative in dealing with the Prince William County Jail but to approach the local circuit court, and that in any event overcrowding was so epidemic that it would have not have possible to assist Prince William. (Petition for Certiorari, p.9). The petitioner characterizes the decision of the court of appeals as in *apparent* agreement that communication with the state court was the only action that the respondents could have taken to limit overcrowding in the jail. (Petition for Certiorari, p.9). However, petitioner argues before this Court that there was manifest evidence that other options were available.

It is clear that the petitioner does not agree with the resolution by the jury of these issues adversely to him. However, as is indicated above, the petitioner's disagreement with factual determinations made by the jury is not a basis for granting certiorari. These issues were fairly presented to the jury and to the court of appeals and they have been consistently resolved against the petitioner. What he now seeks is a third bite at the apple before this Court. He has, however, had every opportunity to convince the trier of fact of his position, but he has failed at every turn.

Another example of the petitioner's complaint about the findings made by the jury in the instant case is his assertion

that the jury, as well as the court of appeals, "*appears* to have accepted testimony that the Department of Corrections has transferred some persons from the jail, but could not transfer more without overburdening other local facilities in the state penitentiary." (emphasis supplied.) The petitioner contends, however, that "the evidence was, more properly, that the respondents simply did not pursue any other available course . . ." (Petition for certiorari pp.9-10) Again, the petitioner complains that the jury chose to believe the evidence of the State defendants and not that the County defendants. This is merely another attempt to relitigate factual determinations made at the trial by the jury in this forum.

The petitioner next points to another area where the jury allegedly ignored evidence of other options available to the State defendants to alleviate overcrowding in the Prince William Jail. The plaintiff asserts that between 1980 and 1982 the State defendants could have transferred Prince William inmates to other institutions where space was available. The jury could also and did, however, choose to believe the evidence adduced by the State defendants that both the Board and the Director of the Department of Corrections consulted counsel about this option and were reasonably advised that it was not viable. Again, petitioner seeks to have this Court substitute its judgment for that of the jury in determining the reasonableness of the State defendants' actions. All of plaintiff's factual arguments concerning the options available to the Department and to the Board of Corrections were made to the jury in the trial of this case in the district court and rejected. The petitioner is simply not entitled to a relitigation of these issues before this Court.

CONCLUSION

This court has ruled: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). The entire premise of the County's petition is that given the "facts" no one could have properly concluded that the State was entitled to a good faith defense. However, absent the most exceptional circumstances, this Court will accept factual determinations in which a district court and a court of appeals have concurred. *Branti v. Finkel*, 445 U.S. 507 (1980). In the case at bar the jury resolved the good faith issue and the facts attendant to it adversely to the County. This petition is nothing more than a request to this Court that it find what two previous courts who have reviewed the lengthy trial record have been unable to find—an absence of good faith either objectively or subjectively. Certiorari should, therefore, be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alan Katz, Assistant Attorney General of Virginia, Counsel of Record for the Respondent in the captioned matter, and a member of the Bar of the Supreme Court of the United States, do hereby certify that three copies of the foregoing Brief in Opposition for Writ of Certiorari were mailed, first class, postage prepaid, to John H. Foote, 9380 F. Forrestwood Lane, Manassas, Virginia 22110 on or before June 15, 1984.

ALAN KATZ
Assistant Attorney General

APPENDIX A

A-1

IN THE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Civil Action 81-1049-AM

CRAYTON E. McELVEEN, JR. *et al.*,

Plaintiffs,

v.

COUNTY OF PRINCE WILLIAM, *et al.*

Defendants.

ORDER

This matter comes before the court on the cross-claim of defendants County of Prince William, members of the Board of Supervisors of the County of Prince William, and the Sheriff of the County of Prince William against defendants T.D. Hutto, Director of the Virginia State Department of Corrections, and members of the Virginia State Board of Corrections. For reasons stated in the accompanying memorandum, the court **ORDERS** judgment entered in favor of T.D. Hutto and the members of the Virginia State Board of Corrections insofar as the cross-claim requests that Hutto and members of the Board of Corrections be held liable for any monetary judgment rendered against the County, the members of the County Board, and the Sheriff of the County. Insofar as the cross-claim prays for equitable relief, the court takes the cross-claim under advisement.

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Let the Clerk send a copy of this order and the accompanying memorandum to all counsel of record.

/s/ RICHARD L. WILLIAMS

Richard L. Williams
United States District Judge

DATE: June 23, 1982

[Text of memorandum accompanying the preceding order denying County cross-claim]:

MEMORANDUM

This matter comes before the court on the cross-claim of defendants County of Prince William, members of the Board of Supervisors of the County of Prince William, and the Sheriff of the County of Prince William ("the County defendants") against defendants T. D. Hutto, Director of the Virginia State Department of Corrections, and members of the Virginia State Board of Corrections ("the State defendants"). For reasons stated below, the court orders judgment entered in favor of the State defendants, insofar as the cross-claim requests that the State defendants be held liable for any monetary judgment rendered against the County defendants.

During the trial before the jury, the court dismissed the State defendants in their official capacities from the case, on eleventh amendment grounds. The State defendants remained in the case in their individual capacities. The jury returned a verdict against the County defendants and in favor of the State defendants. The court subsequently denied County defendants' and plaintiffs' motions for judgment notwithstanding the verdict as to the State defendants under Fed. R. Civ. P. 50(b)(1).

The immunity afforded by the eleventh amendment to the State defendants in their official capacities does not apply to them in their individual capacities. The jury could have returned a verdict against the State defendants in their individual capacities but did not do so. Granting relief to the County defendants via their cross-claim would have the same effect as granting relief to them via their motion for judgment notwithstanding the verdict. The issues presented

to the jury regarding allocation of liability as between the County and State defendants are no different than the ones now presented to the court by the vehicle of the County defendants' cross-claim. The court can see no more reason to nullify the verdict of the jury via the cross-claim than via the motion for judgment *n.o.v.* Hence the court will order judgment entered in favor of the State defendants as to the cross-claim, and leave the jury verdict undisturbed.

An appropriate order accompanies this memorandum.

/s/ RICHARD L. WILLIAMS

Richard L. Williams
United States District Judge

DATE: June 23, 1982

APPENDIX B

B-1

§ 53-135. Any court of record having general chancery jurisdiction in any county or city which maintains and operates any such jail, jail farm or lockup, or in any county in which is situated any town which maintains and operates any such jail, jail farm or lockup, affected by any such order of the Board, shall have jurisdiction to enforce such order by an injunction or other appropriate remedy at the suit of the Board. In the city of Richmond such jurisdiction shall be vested in the Hustings Court of the city. Such proceeding shall be commenced by a petition of the Board at the relation of the Commonwealth and shall, insofar as possible, conform to rules of procedure applicable to chancery practice. The governing body of each county, city or town, which maintains and operates any jail, jail farm or lockup affected by the order of the Board, and the officer in charge of each such jail, jail farm or lockup affected, shall be made parties defendant. In every such proceeding the court shall hear all relevant evidence bearing upon the propriety of the Board's action, and may, in its sound discretion, refuse to grant the injunction if it appears that the action of the Board was not warranted.

§ 53-134. The Board is authorized to prohibit, by its order, the confinement of prisoners in any jail or lockup, or at any jail farm, which is not constructed, equipped, maintained and operated so as to comply with minimum standards prescribed by the Board in accordance with the provisions of § 53-133, and to designate some other jail, jail farm, lockup, or place of detention in or at which shall be confined all persons who otherwise would have been confined in the jail, jail farm, or lockup thus ordered closed by the Board. . . .

§ 53.19.17. The Director is authorized to transfer, or to require to be transferred, any person accused or convicted

of an offense against the laws of the Commonwealth of Virginia or of any other state or country or any offense in violation of any city, town or county ordinance within the Commonwealth, or any witness held in any case to which the Commonwealth is a party, if confined in any penal institution within the Commonwealth, from any penal institution in which such person is confined to such other penal institution in the State as is designated by the Director.

§ 19.2-310. Every person sentenced by a court to confinement in the State penal system upon conviction of a felony shall be conveyed to an appropriate receiving unit operated by the Department of Corrections in the manner hereinafter provided. . . . Under no circumstances shall persons be conveyed to the receiving unit or units of the State penal system beyond the maximum capacity of the unit or units as established by the Director; in this regard, the Director or his designee shall allocate space available in the receiving unit or units by giving first priority to the transportation, as the transportation facilities of the Department of Corrections may permit, of those persons held in jails who in the opinion of the Director or his designee require immediate transportation to a receiving unit.

§ 53-129. When it shall appear to the circuit court of any county or the corporation court of any city that there is no jail therein, or when it appears to such court, from the report of persons appointed to examine the jail or otherwise, that the jail of such county or city is insecure or out of repair, or otherwise insufficient, it shall be the duty of such court to award a rule, in the name and on behalf of the Commonwealth against the governing body of the county, or the governing body of the city, as the case may be, to show cause why a peremptory mandamus should not issue, commanding them to erect a jail for the county or city, or

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to cause the jail of such county or city to be made secure, or put in good repair, or rendered otherwise sufficient, as the case may be, and to proceed as in other cases of mandamus, to cause the necessary work to be done.